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Supreme Court, U.S.
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No. 98-1461

In The

Supreme Court of the United States

October Term, 1998

CONSTRUCTIVIST FOUNDATION, INC.,
F/K/A LEE FOUNDATION, INC.,

Petitioner,

versus

DEKALB COUNTY BOARD OF TAX ASSESSORS,
HONORABLE TOM SCOTT, and DEKALB
COUNTY BOARD OF COMMISSIONERS,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Georgia

DEKALB RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Contrary to the statement in the Petition for Certiorari, the Honorable Tom Scott and the DeKalb County Board of Commissioners were parties in the Georgia Appellate Courts and Respondents believe them to be parties before this Court.

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OPINIONS AND JUDGMENT BELOW

Petitioner attached to its Petition, the opinion and judgments from below. Appendix "A" thereto is the Order from the Superior Court of DeKalb County, Georgia, Appendix "B" thereto is the affirmance by the Georgia Court of Appeals, Appendix "C" thereto is that Court's denial of Petitioner's Motion for Reconsideration, and Appendix "D" thereto is the Georgia Supreme Court's denial of Petitioner's Petition for Certiorari in that Court. Respondents have not attached these Orders to this response. Respondents have attached as Appendix "A" hereto the most recent Order of the Superior Court in a related case, which once again holds Petitioner is not entitled to the relief sought. Respondents have also attached as Appendix "B" hereto a previous Order consolidating and staying a number of related actions that lists Petitioner's previous litigation on these matters.

STATEMENT OF JURISDICTION

Respondents concur with Petitioner that the jurisdiction of this Court would be proper under 28 U.S.C. § 1257, but deny that this is a proper case for a grant of Writ of Certiorari.

STATUTES INVOLVED

Respondents contend that the only statutes involved in this case are the O.C.G.A. § 48-5-41(a) and O.C.G.A.

§ 48-5-41(d). Petitioner also raises issues regarding Georgia Court of Appeals Rule 36.

STATEMENT OF THE CASE

Petitioner is a taxpayer in DeKalb County, Georgia. The Respondents are the DeKalb County Board of Tax Assessors, its Chairman, Tom Scott, and the DeKalb County Board of Commissioners. Petitioner appeals from a trial court's decision, affirmed without opinion by the Georgia Court of Appeals, denying Petitioner's requested exemption from ad valorem taxation.

Petitioner's statement of the case appears generally accurate as to what it includes. Petitioner, however, omits a number of important facts. Petitioner elsewhere in its Petition makes statements of fact that are inaccurate or not supported by the record in this case.

Petitioner argues that its due process rights have been violated. Petitioner fails to tell this Court that the action currently pending is only one of *seven* that Petitioner has pursued on the same exemption and valuation issues. It has filed both tax appeal and tax refund actions. *Compare* O.C.G.A. § 48-5-311 *with* O.C.G.A. § 48-5-380. Therefore, Petitioner has had multiple levels of administrative review (before the Board of Assessors, the Board of Equalization, and/or the DeKalb County Board of Commissioners), as well as several hearings in the Superior Court of DeKalb County, on the same issues on each occasion. Appendix "B", pp. 32-33. Petitioner also had the opportunity for appellate review, although it was not pursued on each occasion. Respondents have attached as

Appendix "A" the most recent, detailed, Order of the Superior Court, once again finding Petitioner is not entitled to an exemption; and as Appendix "B" the Superior Court's previous ruling on a Motion to Consolidate and Stay that sets forth Petitioner's lengthy litigation history. The DeKalb County Respondents submit that Petitioner has had an extraordinary amount of due process on these issues.

Petitioner argues at several points in the Petition that the property generates no revenue, and for that reason it is entitled to the same religious characterization as its lessees. In attempting to support that assertion, Petitioner asserts that it received no income from its operations on the property at issue. This assertion is contrary to the trial court's specific finding that "Plaintiff merely made its real estate available (for a substantial monetary charge) to other institutions for their use." Petition, Appendix A at p. 6A. The trial court made several findings regarding Petitioner's revenue and use of that revenue from the property. For instance, payments in 1992 were supposed to be used for renovation, but such renovations were *not* done as agreed. The trial court also found that Petitioner was not a purely public charity, and in fact there was no evidence Petitioner used the property to dispense charity. Moreover, the trial court found that Petitioner did not use the property itself as a place of religious worship. Petition, Appendix A, *passim*.

Petitioner contends that it was denied equal protection because another entity, that being Emory University, received an exemption for a place of religious worship located on campus. There is *no* evidence regarding Emory in the record. Moreover, Petitioner fails to specify what

particular property on Emory's campus it is referring to. Petitioner also fails to demonstrate how Emory is similarly situated. Further, Emory, as a college, has a separate basis for an ad valorem exemption under O.C.G.A. § 48-5-41(a)(6). This lack of a factual record eviscerates Petitioner's equal protection claims.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Through its Petition for Certiorari, Petitioner asks this Court to review a Georgia trial court's interpretation of a Georgia tax exemption. That interpretation was affirmed by the Georgia Court of Appeals without opinion, and the Georgia Supreme Court declined to review the interpretation on a Petition for Certiorari. The Petition before this Court asserts an equal protection violation without a showing of differential treatment of similarly situated persons. Petitioner also asserts a due process violation without articulating a standard or demonstrating a violation. In fact, Petitioner, in just this case, received two levels of administrative review, a full blown trial in Superior Court, as well as appellate review. Finally, without any support in the law, Petitioner asserts that the failure of the Georgia Court of Appeals to issue a written opinion violates various constitutional rights.

In short, this case involves no substantial federal, constitutional or statutory, right (but only a state tax exemption), no differential treatment and no lack of due process. Petitioner is merely another disgruntled taxpayer that is disappointed with the results below. The

DeKalb County Respondents respectfully suggest that this case does not meet the standard for a grant of Certiorari. Sup. Ct. R. 10.

ARGUMENT

I.

The DeKalb County Superior Court And The Georgia Court Of Appeals Did Not Violate Petitioner's Fourteenth Amendment Rights By Upholding A Denial To Petitioner Of An Exemption From Ad Valorem Taxation As A Place Of Religious Worship.

A. The Denial Of An Ad Valorem Tax Exemption To Petitioner As A Place Of Religious Worship Does Not Violate Petitioner's Equal Protection Rights.

In order to establish a violation of equal protection rights, Petitioner must show that (1) he was treated differently than, (2) a similarly situated person or entity. *See Romer v. Evans*, 517 U.S. 620, 621, 630-32, 116 S. Ct. 1620, 1623, 1627-28, 134 L. Ed. 2d (1996). If a party establishes differential treatment from similarly situated persons, then the appropriate level of judicial scrutiny to apply to that differential treatment must be determined. *See City of Clebourne v. Clebourne Living Ctr., Inc.*, 473 U.S. 432, 440-42, 105 S. Ct. 3249, 3254-55, 87 L. Ed. 2d 313 (1985).

There are three levels of scrutiny. The first is rational basis, which simply requires that the action rationally advances a reasonable and identifiable governmental objective. *Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S. Ct. 1074, 1083, 67 L. Ed. 2d 186 (1981). The second level is intermediate scrutiny which requires a showing that the

challenged governmental action serves an important governmental objective and is substantially related to the achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 456-57, 50 L. Ed. 2d 297 (1976). The third level, strict scrutiny, applies when the governmental action adversely affects a suspect class or a fundamental right, such as religious freedom. Strict scrutiny requires that a governmental action be justified by a compelling state interest and be narrowly tailored to meet that interest. *Church of the Lukumi Babaluiaye v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 2226, 124 L. Ed. 2d 472 (1993).

However, a law that is neutral and of general applicability need not meet this strict scrutiny test even if it has the incidental affect of burdening a particular religious practice. *See Employment Div., Ore. Dept. of Hum. Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1594, 108 L. Ed. 2d 876 (1990). Because the tax exemption is a facially neutral law of general applicability, to succeed on their equal protection claim the Petitioner must demonstrate that it was treated differently as the result of governmental action that did not "rationally advanc[e] a reasonable and identifiable governmental objective." *Schweiker*, 450 U.S. at 235, 101 S. Ct. at 1083; *see City of Clebourne*, 473 U.S. at 440, 105 S. Ct. at 3255. The rational basis, however, need not actually have been relied upon by the governmental body: it is enough if there are "plausible reasons" for the governmental actions. *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179, 101 S. Ct. 453, 461, 66 L. Ed. 2d 368 (1980); *Fleming v. Nestor*, 363 U.S. 603, 612, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 (1960); *cf. Clebourne Living Center*, 473 U.S. at 447-50, 105 S. Ct. at 3259-60 (considering

actual grounds of governmental decision in determining that special zoning requirement was not supported by "any rational basis").

While this Court has held a government may constitutionally exempt church property from taxation without running afoul of the establishment clause, it is also proper to tax property owned by a church and exemption is not constitutionally required. *Compare Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) *with Gibbons v. District of Columbia*, 116 U.S. 404, 6 S. Ct. 427, 29 L. Ed. 680 (1886).

In asserting its equal protection argument, Petitioner simply alleges its peculiar interpretation of O.C.G.A. § 48-5-41(a)(2), which provides a tax exemption for places of religious worship, and argues that the DeKalb County Superior Court misinterpreted the statute and the case of *Church of God of Union Assembly, Inc. v. City of Dalton*, 216 Ga. 659, 119 S.E.2d 11 (1961). The Georgia Court of Appeals affirmed the trial court's interpretation without opinion and the Georgia Supreme Court declined to review that interpretation. Petitioner does not allege that another person or entity benefitted from a different interpretation of the statute or case. Under the circumstances, there is no federal statutory or constitutional provision at issue when the Georgia courts interpret a Georgia tax exemption statute and there is no evidence of differential treatment. This Court has not taken it upon itself to review such issues. *Cf. Michigan v. Long*, 463 U.S. 1032, 1037-44, 103 S. Ct. 3469, 3476-78, 77 L. Ed. 2d 1201 (1983) (discussing court's refusal to review decisions resting on independent and adequate state grounds). In fact, the federal courts typically do not involve themselves in state

taxation matters. *See* 28 U.S.C. § 1341 (Tax Anti-Injunction Act) (precluding federal court jurisdiction in state tax matters).

Petitioner argues, "as far the Foundation is concerned, this [the Petitioner's position] is clear and by interpreting the case differently, contrary to the Foundation's interest, the state is violating the Foundation's right to equal protection of the laws." Petitioner misapprehends the nature of an equal protection claim. A State does not violate a person's equal protection rights because a court interprets a law differently than that person does. Rather the Petitioner must show that the State treated another person, similarly situated to Petitioner, differently, which Petitioner has failed to do. Petitioner has not presented any evidence of a situation where an otherwise non-exempt entity was granted a tax exemption when that entity leased property to a church as a place of religious worship. Therefore, Petitioner has not made out an equal protection violation.

Petitioner then cites two cases from other states. *Scott v. Society of Russian Israelite*, 59 Neb. 571, 81 N.W. 624 (1900) and *Washburn College v. Commissioners of Shawnee*, 8 Kan. 344 (1871). These cases are from the supreme courts of states other than Georgia, interpreting those states' tax exemptions for religious property. These cases have no bearing on a case involving the Georgia Courts' interpretation of the Georgia taxation statute. *See New State Ice Co. v. Liebman*, 285 U.S. 262, 311, 52 S. Ct. 371, 386, 76 L. Ed. 747 (1932) (Brandeis, J., dissenting) (discussing states as laboratory of social and economic experimentation). Even if these courts were interpreting statutory language identical to that in Georgia, that would not bind

the courts in Georgia to reach the same conclusion. There is no rule that requires states to interpret their own statutes consistently with the interpretation by other states of those states' own statutes. Furthermore, this Court certainly has not sought to impose such consistency on the states. *See Spencer v. State of Texas*, 385 U.S. 554, 564, 87 S. Ct. 648, 653-54, 17 L. Ed. 2d 606 (1967) (noting U.S. Supreme Court is not "a rule making organ for the promulgation of state rules of criminal procedure."). Based on this Court's previous jurisprudence, it would be improper to grant this Petition for the purposes of reinterpreting the Georgia tax exemption statute.

Finally, on page 18 of the Petition, Petitioner at least states an appropriate equal protection argument, albeit one that is without support in the record and ultimately unavailing. Petitioner argues that it was denied equal protection of the laws because Emory University was provided a tax exemption for a church which operates a place of religious worship on the Emory campus. Petitioner did not develop this argument in the trial below and there is no evidence in the record to support this argument. *See Liberty Warehouse Co. v. Burley Tobacco Growers Co-op*, 276 U.S. 71, 91, 48 S. Ct. 291, 295, 72 L. Ed. 473 (1928) (noting that equal protection claims are fact intensive). Moreover, as an educational institution, Emory University, unlike the Petitioner, has an independent grant of an ad valorem exemption pursuant to O.C.G.A. § 48-5-41(a)(6). More importantly, however, this Court has held that the determination of whether two persons are similarly situated for the purposes of an

equal protection argument is fact intensive. *Liberty Warehouse, supra*. Even if it were otherwise a meritorious argument, the record in this case is simply non-existent to evaluate Petitioner's claims regarding Emory University.

Finally, the denial of an ad valorem tax exemption to Petitioner is rationally related to a legitimate government purpose. A government could reasonably conclude that it would not exempt landowners who lease property to others for religious purposes. Otherwise, a strip mall owner by leasing a store front to a church may seek an exemption. The government could reasonably conclude that the lost revenue and administrative costs of such a rule rendered it unworthy of adoption. Therefore, the denial of the exemption in this case is rationally related to legitimate government objectives (increased revenue and lower administrative costs) and survives rational basis scrutiny.

B. The Denial Of An Ad Valorem Tax Exemption To Petitioner As A Place Of Religious Worship Does Not Violate The Petitioner's Rights To Due Process Of Law.

Petitioner argues "the denial of an exemption for the Foundation's property as a place of religious worship for Tax Year 1994, which exemption the Foundation's property is entitled to under clear reading of the statute and case law, violates the Foundation's due process rights under the Fourteenth Amendment because the denial places an unnecessary destructive financial burden on the Foundation." It is unclear whether Petitioner is asserting a substantive or a procedural due process claim.

To the extent the Petitioner is asserting a substantive due process claim, Petitioner's claim must be analyzed as one asserting a violation of the free exercise clause. *See Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992) (noting that the Court will focus on allegations to determine particular constitutional right at issue). To the extent that Petitioner is asserting a procedural due process claim, that claim must fail because Petitioner has received all the process that it is due. *See McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110, 115 S. Ct. 818, 130 L. Ed. 2d 783 (1995). Petitioner has received notice and an opportunity to be heard in administrative hearings and then in a judicial forum, with an opportunity for appellate review. This level of process is more than adequate.

Turning to the free exercise clause analysis, Petitioner's claim in this regard must fail as well. This Court has "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Employment Division Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876 (1990) (*citing United States v. Lee*, 455 U.S. 252, 263, n. 3, 102 S. Ct. 1051, 1058 n.3, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment)). This Court in *Smith* noted that the Court had barred application of neutral generally applicable laws only when the law implicated the free exercise clause *and* some *other* constitutional protection such as free speech or free press. *Id.* at 881, 110 S. Ct. at 1602. Petitioner makes no such allegation in this case.

United States v. Lee involved the issue of whether the free exercise clause precluded enforcement of social security tax laws against the Amish. In *Lee*, this Court assumed that payment of social security taxes and receipt of benefits of that program violated Amish religious beliefs and interfered with the free exercise of their religious rights. 455 U.S. at 257, 102 S. Ct. at 1055. The Court also noted that the government's interest in the social security system was very high. In balancing the two interests, the Court concluded "because the broad public interest in maintaining its sound tax system is of such high order, religious beliefs that conflict with the payment of taxes for it is no basis for resisting the tax." *Id.* at 260, 102 S. Ct. at 1057. While tax exemptions are proper, *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), the First Amendment does not require such an exemption from taxes for religious organizations. *See Smith*, 494 U.S. at 889 (*quoting Lee, supra*); *see also Gibbons v. District of Columbia*, 116 U.S. 404, 6 S. Ct. 427, 29 L. Ed. 680 (1886) (upholding differential rate of taxation of church land not occupied or appurtenant to church buildings).

In *Smith*, the Petitioners faced the loss of unemployment compensation benefits after they were terminated for engaging in the religious ceremonial use of an illegal drug. This Court held that the free exercise clause did not require exempting religiously motivated drug use from the application of the state's general law barring payment of unemployment compensation to illegal drug users. 494 U.S. at 888, 110 S. Ct. at 1604-05. Likewise, in this case, the free exercise clause does not require DeKalb County

to grant Petitioner a tax exemption not otherwise available to Petitioner under Georgia law.

Put simply, there is no support in this Court's jurisprudence for the argument that the denial of a tax exemption to Petitioner violates Petitioner's free exercise rights. That Petitioner asserts that it went bankrupt as a result of a lack of an exemption does not help its position. In *Smith*, the individuals could have lost their unemployment benefits as a result of the Court's ruling. This Court concluded, however, that an individual's right to free exercise of religious beliefs must give way to enforcement of a neutral generally applicable law, even if it meant the individual must cease to exercise the particular right at issue. *Smith, supra; Lee, supra.* DeKalb County, Georgia's interest in a consistently applied tax system and limiting exemptions outweighs any concern about this particular organization's ability to pay the tax. Denial of the exemption does not violate Petitioner's free exercise rights.

II.

The DeKalb County Superior Court And The Georgia Court Of Appeals Did Not Violate Petitioner's Fourteenth Amendment Rights By Upholding A Denial To Petitioner Of An Exemption From Ad Valorem Taxation As A Purely Public Charity.

A. The Denial Of An Ad Valorem Tax Exemption To Petitioner As A Purely Public Charity Does Not Violate Petitioner's Equal Protection Rights.

As with its argument regarding its status as a place of religious worship, Petitioner argues that because it made

no money from the property, the Superior Court erred in its application of the Georgia tax exemption statute. Petitioner argues that failure to apply the statute "in accordance with a clear reading of the statute . . . violates the Foundation's right to equal protection of the laws." As argued above, this is not the appropriate analysis under the equal protection clause. Rather, Petitioner must show some other similarly situated charitable taxpayer was treated differently, and that the differential treatment was improper. Petitioner does not even attempt to do so. For the same reasons the Petitioner's assertions of an equal protection violation failed with regard to its treatment as a place for religious worship, its argument as a purely public charity must also fail. Moreover, the trial court concluded as a matter of fact that Petitioner had presented *no* evidence of its alleged charitable work. Petition, Appendix A, at pp. 3a, 4a, 6a. This Court "rarely" grants a petition for certiorari to review allegedly erroneous factual findings. Sup. Ct. R. 10.

B. The Denial Of An Ad Valorem Tax Exemption To Petitioner As A Purely Public Charity Does Not Violate Petitioner's Right To Due Process Of Law.

The summary of the Petitioner's argument in this regard is found on page 24 of its Petition, where Petitioner argues "the Foundation has clearly been deprived of its constitutional right and liberty to continue to practice its charitable religious works at the site without due process of law. The Foundation cannot afford to allow the site to be used as a place of religious worship any

longer." Again, Petitioner fails to articulate a cogent argument under any of the three constitutional analyses (procedural due process, substantive due process, or free exercise) to support its ambiguous statement. It has no general substantive due process argument because its actual claim is one of a violation of its right of free exercise of religious liberty. For the same reasons articulated above, this claim must fail in the context of a purely public charity, as well. Moreover, Petitioner's claim in this regard is even more tenuous because there is *no* constitutional protection for charitable works, whereas, there is at least arguable protection for religious conduct. Finally, after numerous administrative hearings and three levels of judicial review, Petitioner fails to articulate how it has been denied its right to procedural due process. Moreover, as noted above, the trial court found no evidence of charitable work by Petitioner.

III.

The Georgia Court Of Appeals Did Not Violate Petitioner's Fourteenth Amendment Rights To Equal Protection Or Due Process By Failing To Render A Written Decision With Precedential Value.

Petitioner argues that because the Georgia Court of Appeals followed one of its Rules of Procedure and affirmed the trial court without an opinion, Petitioner's equal protection and due process rights have been violated. This argument is frivolous.

Georgia Court of Appeals Rule 36, entitled, "Affirmance Without Opinion, When Rendered" provides as follows:

> Cases in which:
>
> (1) the evidence supports the judgment;
>
> (2) no reversible error of law appears and an opinion would have no precedential value;
>
> (3) the judgment of the court below adequately explains the decision; and/or
>
> (4) the issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief,
>
> may be affirmed with out opinion. They have no precedential value.

Incredibly, Petitioner is asking this Court to rule that a procedural rule that is quite common, if not universal, violates the equal protection and due process rights of litigants. Even this Court's own rules provide that its order on a petition "may be a summary disposition on the merits." Sup. Ct. R. 16(1).

Petitioner can muster no support for this argument other than a couple of law review articles that complain about the lack of published opinions in federal courts of appeal. There is absolutely no law that a litigant has a right, much less a constitutional right, to a written decision in any particular case. Petitioner presents no evidence that only certain classes of litigants are not provided with written decisions, although such differential treatment is a necessary requirement for an equal protection claim. Petitioner provides no legal support for its assertion that due process requires, in addition to notice and opportunity to be heard, a written appellate decision. *See Ross v. Moffit*, 417 U.S. 600, 609-11, 94 S. Ct. 2437, 2443-44, 41 L. Ed. 2d 341 (1974) (noting that states are not required to provide appeals in criminal cases).

These are matters solely for internal procedural rules and provides no basis for this Court to review the rulings of the courts below. *Cf. City of West Covina v. Perkins*, No. 97-1230 (U.S. Sup. Ct., Jan. 13, 1999) (holding no constitutional requirement that individuals be informed of state remedies for retrieving seized property). Therefore, Georgia infringed no constitutional right when the Court of Appeals did not issue a written opinion.

CONCLUSION

For the reasons given above, Respondents respectfully request this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted, this 14th day of April, 1999.

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APPENDIX "A"

IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

CONSTRUCTIVIST FOUNDATION, INC.,	:	
Plaintiff,	:	Civil Action File
vs.	:	No. 96cv-14239-4
DEKALB COUNTY BD. OF TAX ASSESSORS, *et al.*,	:	
Defendants.	:	

ORDER

(Filed Mar. 23, 1999)

Defendants' motion to dismiss (filed November 22, 1996) came before the Court for consideration. Upon review of the pleadings and other matters of record, the Court finds as follows:

In a prior related matter, *Constructivist Foundation v. DeKalb County et al.*, C.A. File No. 95cv-11487-4, a consolidated tax appeal and tax refund action appealing tax years 1992, 1993, 1994 and seeking a refund for tax years 1988, 1989, 1990, 1991, and 1992, Plaintiff contended that its real property was entitled to exemption from ad valorem taxation pursuant to O.C.G.A. § 48-5-41(a)(2) and (4)[1] and alternatively challenged the assessed value of the

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[1] "The following property shall be exempt from all ad valorem property taxes in this state: . . . (2) [a]ll places of religious worship or burial; [and] (4) [a]ll institutions of purely public charity" O.C.G.A. § 48-5-41(a)(2), (4) (1991).

property. At the trial of this matter on March 14, 1995, the Court considered the taxability of the subject property but did not address valuation as raised in the tax appeals or any of the issues raised in the refund claims.

On April 2, 1995, the Court issued its ruling in C.A. No. 95cv-11487-4: "[T]his Court finds that Plaintiff is not exempt from taxation as an institution of purely public charity[,]" and "that Plaintiff's property is not exempt from ad valorem taxation as a place of religious worship." (Order, p. 6, C.A. File No. 95cv-11487-4.) Plaintiff took an appeal of this decision, but before doing so dismissed without prejudice its challenge to the valuation of the property for tax years 1992, 1993 and 1994 and its refund claims for tax years 1988, 1989, 1990, 1991, and 1992. (Dismissal, filed April 19, 1995, C.A. File No. 95cv-11487-4.)

During the pendency of its appeal, Plaintiff commenced three more actions asserting tax appeals for the tax years 1992, 1993, 1994, 1995 and 1996 and renewing its tax refund claims for tax years 1988, 1989, 1990, 1991 and 1992. *Constructivist Foundation v. DeKalb County et al.*, C.A. File No. 96cv-11335-4 (filed October 16, 1996); *Constructivist Foundation v. DeKalb County Board of Tax Assessors*, C.A. File No. 96cv-11544-4 (filed October 22, 1996) *Constructivist Foundation v. DeKalb County Tax Assessors*, C.A. File No. 96cv-14239-4 (filed December 2, 1996). These three cases were consolidated by consent of the parties into the above-styled action and stayed pending the outcome of Plaintiff's appeal in C.A. No. 95cv-11487-4. (Order, February 5, 1997.)

On March 4, 1997, the Court of Appeals affirmed without opinion this Court's order of April 2, 1995 in C.A. File No. 95cv-11487-4. After Plaintiff's motion for reconsideration and application for certiorari to the Georgia Supreme Court were denied, the Court on December 3, 1998 entered its remittitur order in C.A. File No. 95cv-11487-4 and lifted the stay in this case.

This matter is now before the Court on Defendant DEKALB COUNTY BOARD OF TAX ASSESSORS' ("Defendant") motion to dismiss, originally filed in C.A. File No. 96cv-11335-4 on November 21, 1996 and supplemented in this action on January 11 and February 22, 1999. Plaintiff filed its first response in opposition to this motion on December 23, 1996 (erroneously filed in C.A. File No. 95cv-11487-4); Plaintiff's second response was filed in this action on February 10, 1999.

Tax Appeals – Taxability

Defendant moves to dismiss Plaintiff's tax appeals for the tax years 1992, 1993, and 1994 on the grounds that the same were previously adjudicated in C.A. 95cv-11487-4, and for the tax years 1995 and 1996 on the grounds that the decision in that action precludes Plaintiff from relitigating their claim of exemption. Plaintiff in response does not dispute that its tax appeal for the tax years 1992, 1993 and 1994 has been finally adjudicated,[2]

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[2] "OCGA § 9-12-40 codifies the doctrine of res judicata: 'A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have

but "contends that the facts affecting taxability [and] assessment . . . differ from year to year," and states further that "the facts concerning improper assessment are entirely different from those facts concerning tax exemption upon which Judge Flake based her Order in Case No. 95-11487-4." (Plaintiff's response, pp. 2, 3.)

"OCGA § 48-5-311 provides a statutory appeal system which authorizes any taxpayer to appeal from an assessment by the country board of tax assessors 'as to matters of taxability, uniformity of assessment, and value, and as to denials of homestead exemptions.' *Id.* at OCGA § 48-5-311(e)(1)." *Vann v. DeKalb County Bd. of Tax Assessors*, 186 Ga.App. 208, 210, 367 S.E.2d 43 (1988).

> The taxpayer or, except as otherwise provided in this paragraph, the county board of tax assessors may appeal decisions of the county board of equalization, the arbitrator, or the arbitrators,

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been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.' See *Mciver v. Jones*, 209 Ga. App. 670, 672 (434 S.E.2d 504) (1993)." *Grice v. Detweiler*, 227 Ga.App. 280, 282, 488 S.E.2d 755 (1997) (Beasley, J., dissenting).

In the instant case, the taxability of Plaintiff's property for tax years 1992, 1993, and 1994 was adjudicated in C.A. File No. 95cv-11487-4, an action between the same parties; and the Court's decision in that case was upheld on appeal. The doctrine of *res judicata* accordingly bars Plaintiff from relitigating the taxability of its property for those tax years in this action. "Questions between parties once and finally settled by a final judgment must be considered as ending the litigation as to those matters as between those parties. They cannot be relitigated in other actions either directly or indirectly." *Georgia Farm Buildings, Inc. v. Willard*, 169 Ga.App. 394, 395, 313 S.E.2d 112 (1984) (citations omitted).

> as applicable, to the superior court of the county in which the property lies. . . . The county board of tax assessors shall certify to the clerk of the superior court the notice of appeal and any other papers specified by the person appealing including, but not limited to, the staff information from the file used by either the county board of tax assessors or the county board of equalization. All papers and information certified to the clerk shall become a part of the record on appeal to the superior court. . . . The appeal shall constitute a de novo action.

O.C.G.A. § 48-5-311(g)(1-3) (1991).

Plaintiff's tax appeals for the tax years 1995 and 1996 state identically that "[t]he basis for the appeal by the Foundation of the denial of the Foundation's application for ad valorem tax exemption [of Plaintiff's] property is the Foundation's contention that the uses meet the requirements of Georgia law for an ad valorem tax exemption under O.C.G.A. Secs. 48-5-41(2), (4) & (6),[3] for the reasons, among others, presented before the Board of Equalization." (Plaintiff's "Notice of Appeal of 21 May 1996 Decision of BOE," filed June 5, 1996; Plaintiff's "Notice of Appeal of 13 November 1996 Decision of BOE," filed December 18, 1996.)

Regarding valuation, the notices both state that "[t]he basis for the Foundation's appeal regarding valuation is

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[3] O.C.G.A. § 48-5-41(a)(6) provides an exemption from ad valorem taxation for "[a]ll buildings erected for and used as a college, incorporated academy, or other seminary of learning. . . . " (1991). For exemptions provided under subsections (a)(2) and (6) of this Code section, see fn. 1 *supra*.

that the BOE's revaluation for tax year 1995" and "evaluation for tax year 1995 was excessively and unreasonably high for the property." (Plaintiff's "Notice[s]," filed June 5 and December 18, 1996.)

Review of Plaintiff's applications for exemption for the tax years 1995 and 1996 and its appeals to the Board of Equalization ("BOE") therefrom indicate, however, that Plaintiff did not assert an O.C.G.A. § 48-5-41(a)(4) charitable or (a)(6) educational exemption before the BOE for those tax years. In its "Exempt Property Application" for tax year 1995, Plaintiff indicated that it was seeking exemption for its property as "Places of religious worship or no rent income residences." (Plaintiff's 1995 "Application," p. 1.) In response to the directive on the same form to "Describe exactly how the property is used. Specify percentages for each use." Plaintiff responds, "70% of subject property is used for religious activities and counseling. Sev. churches use property incl. the Fdn.'s agent Rev. Christopher Hunt. 30% is storage and empty school space." (Plaintiff's 1995 "Application," p. 1.)

Plaintiff chose the same "places of religious worship" exemption for tax year 1996. (Plaintiff's 1996 "Application," p. 1.) In response to the same directive as quoted above for 1995, Plaintiff states that in tax year 1996 its property is used "[f]or religious worship – 60%. For school with Religious instruction – 40%." (Plaintiff's 1996 "Application," p. 1.)

Plaintiff's failure to raise the O.C.G.A. § 48-5-41(a)(4) and (6) charitable and educational exemptions before the BOE, however, precludes their consideration before this Court in this *de novo* action.

> What is the effect of a de novo action, hearing, proceeding, investigation, or appeal? "It brings up the whole record from the Court below, and all competent evidence shall be admissible on the trial thereof, whether adduced at on a former trial or not; either party is entitled to be heard on the whole merits of the case."
>
> . . . " 'Such a case must be tried anew *as if no trial had been had.* It is not the province of the superior court on such an appeal to review and affirm or review the rulings of the [trial tribunal], *but to try the issue anew* and pass original judgments on the questions involved [below] *as if there had been no previous trial.*' "

Weeks v. Bd. of Tax Equalization, 139 Ga.App. 37, 37-38, 227 S.E.2d 865 (1976) (underline emphasis added) (citations omitted). "Code Ann. § 92-6912(6)(C) [subsumed by O.C.G.A. § 48-5-311] provides that the appeal to the superior court shall constitute a de novo action. The question then is whether this provision permits appellant to raise in the superior court appeal issues which were not raised in the original appeal to the Board of Equalization. *We conclude that it does not.*

> The Act provides that a taxpayer may appeal to the Board of Equalization on three grounds, namely, matters relating to (1) taxability, (2) uniformity and (3) value. The taxpayer must specify the grounds of appeal. The board is required to specifically decide in writing all questions presented to it. The taxpayer then may appeal the board's *decisions* to the superior court. As we read the Act only those decisions of the Board of Equalization on the questions presented to it or

> incident thereto may be relitigated in the superior court. [A]ppellant . . . can not raise a new claim . . . for the first time on appeal to the superior court.

Camp v. Boggs, 240 Ga. 127, 128, 239 S.E.2d 530 (1977) (underline emphasis added) (citations omitted); *see also, Bouy v. Kiley,* 238 Ga. 47, 230 S.E.2d 861 (1976) ("Having failed to appeal from the Board's decision, [appellants] could not at a latter date successfully institute an original action in the superior court to raise the issue of taxability.").

Independently of Plaintiff's failure to raise two of its three claimed exemptions before the BOE is the fact that Georgia law does not permit the assertion of alternative or "combination" ad valorem tax exemptions. "[I]n applying the exemption authorized by basic Georgia law to the facts of the individual case, . . . we must . . . look to the *primary use of the property* to determine if it is exempt from taxation. In addition . . . all tax exemptions are to be strictly construed since taxation is the rule and exemption is the exception." *Leggett v. Macon Baptist Ass'n, Inc.,* 232 Ga. 27, 28, 205 S.E.2d 197 (1974) (underline emphasis added) (religious exemption); *see also, York Rite Bodies of Freemasonry v. Bd. of Equalization of Chatham County,* 261 Ga. 558, 408 S.E.2d 699 (1991) (emphasis added) (charitable exemption; "[T]he use of the property must be *exclusively devoted* to conduct that benefits the public by furthering the charitable pursuits of its owner."); *Rabun Gap-Nacoochee School v. Thomas,* 228 Ga. 231, 184 S.E.2d 824 (1971) (educational exemption; "It is the use to which the property of an educational institution is put . . . that determines the question of its exemption.").

Thus the only exemption question before this Court *de novo* is whether Plaintiff was entitled to an O.C.G.A. § 48-5-41(a)(2) "religious" exemption for its property for the tax years 1995 and 1996. Defendant argues that the Court's decision in C.A. File No. 95cv-11487-4 that the property was not so exempt is determinative of Plaintiff's claim for tax years 1995 and 1996, but Plaintiff in opposition contends that "[i]n the instant case, the Foundation contends that the facts affecting taxability . . . differ from year to year." (Plaintiff's second response, p. 2.)

In seeking to consolidate C.A. File No. 96cv-11544 with this case, however, Plaintiff represented the contrary to the Court: "This case [C.A. File No. 96cv-11544-4] is a tax appeal of the Foundation's ad valorem taxes for 1995. . . . The legal issues and facts involved in the above-captioned litigation *are identical to the facts and legal issues involved in Appeal Case No. A96A2534* [Plaintiff's appeal of the Court's April 2, 1995 decision in C.A. File No. 95cv-11487-4] which is pending before the Georgia Court of Appeals at this time." (Plaintiff's motion to stay, C.A. File No. 96cv-11544-4, ¶¶ 1, 3, filed January 8, 1997) (emphasis added).

" '[J]udicial admissions [which may include admissions in pleadings, stipulations, affidavits, and other documents and trial conduct of the parties] define the issues in the suit. . . . They are conclusive, and as such, they should be clearly distinguished from admissions introduced as evidence.' Green, Ga. Law of Evidence (2d ed.), Admissions § 238, p. 393." *Howell Mill/Collier Associates, Inc. v. Pennypackers, Inc.*, 194 Ga.App. 169, 172, 390 S.E.2d 257 (1990). "Such an admission is conclusive; '[i]t is binding upon the party and estops the party from denying the

admission or introducing any evidence to controvert such admission, even if the admission is not true.' Green, Ga. Law of Evid., Admissions, § 238, p. 422." *Jabaley v. Jabaley*, 208 Ga.App. 179, 430 S.E.2d 119 (1993).

"Without offering the same in evidence, either party may avail himself of allegations or admissions made in the pleadings of the other." O.C.G.A. § 24-3-30 (1993). "Thus, a judicial admission in effect is " 'a waiver relieving the opposing party from the need of any evidence,' " as to that matter. *Piedmont Aviation v. Washington*, 181 Ga. App. 730, 731(2) (353 S.E.2d 847)." *Jabaley*, 208 Ga.App. at 179. "Further, and most importantly in the case sub judice, a trial court may take judicial notice of its own records for evidentiary purposes in a case, either civil or criminal, that is pending before it. OCGA § 24-1-4; *Petkas v. Grizzard*, 252 Ga. 104 (312 S.E.2d 107) (1984)." *Graves v. State*, 227 Ga.App. 628, 630, 490 S.E.2d 111 (1997).[4]

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[4] "Statements in pleadings are considered as judicial and not as evidential admissions, and for these purposes, until withdrawn or amended, are conclusive. *Wood v. Claxton*, 199 Ga. 809(1) (35 S.E.2d 455) (1945); *State Farm &c. Ins. Co. v. Anderson*, 107 Ga. App. 348, 353 (130 S.E.2d 144) (1963). However, " '[e]stoppels by admissions made in pleading apply only between parties and privies to the suit or litigation in which the admissions relied on as an estoppel were made.' [Cits.]" *Walea v. Pierce*, 202 Ga. 367, 370 (43 S.E.2d 268) (1947); see also *Murray County v. Pickering*, 198 Ga. 354(1) (31 S.E.2d 722) (1944). When such admissions in pleadings are introduced as evidence in a later and different action, they no longer operate as admissions *in judicio* but, rather, as evidentiary admissions. As evidence, such admissions may be explained or contradicted." *Foster v. State*, 157 Ga.App. 554, 555-556, 278 S.E.2d 136 (1981).

C.A. File No. 96cv-11544-4 was consolidated into the instant action, C.A. Filed No. 96cv-14239-4 by order of the Court on

Plaintiff having admitted that the facts alleged in its tax appeal for 1995 are "identical" to those adjudicated by the Court in C.A. File No. 95cv-11487-4, and the Court's decision on that taxability issue having been affirmed without opinion by the Court of Appeals, "[r]elitigation of this issue is therefore barred by the doctrine of collateral estoppel." *Trend Star Continental, Ltd. v. Branham*, 220 Ga.App. 781, 782, 469 S.E.2d 750 (1996) (citations omitted).[5]

The only question which remains, then, is whether the facts upon which Plaintiff's appeal for tax year 1996 is based are materially different from those alleged in support of Plaintiff's claim of exemption for previous years. *Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, 623-624 (1933).

Regarding tax year 1996, review of the record reveals that the text of the affidavit submitted by Plaintiff in support of its exemption from taxation for that year is virtually identical to that submitted in support of its 1995

February 5, 1997. Accordingly, Plaintiff's statements in C.A. File No. 96cv-11544-4 are *in judicio* admissions in the instant case.

[5] " 'Collateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies. Like res judicata, collateral estoppel requires the identity of the parties or their privies in both actions. However, unlike res judicata, collateral estoppel does not require identity of the claim – so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim.' (Footnotes omitted.) *Waldroup v. Greene County Hosp. Auth.*, 265 Ga. 864, 866-867(2) (463 S.E.2d 5) (1995)." *Matherly v. Kinney*, 227 Ga.App. 302, 304, 489 S.E.2d 89 (1997).

claimed exemption. Two paragraphs were added to the 1996 affidavit and they state as follows: "*Starting in 1993*, the Foundation received no income from the property because the use of the property was given to First Love Foursquare Church, on a yearly basis, to utilize the property according to the purposes of the Foundation. . . . ; "[c]harges for use were only intended to cover operating costs and were not primarily for producing income for the Foundation." (1996 "Affidavit," C.A. File No. 96cv-14239, ¶¶ 18, 15) (emphasis added).

Plaintiff's pleadings illustrate the identity between Plaintiff's claim of exemption for tax year 1995 and for tax year 1996. Any change in use which took place beginning in 1993 was equally applicable to tax year 1995 as to tax year 1996. As to Plaintiff's statement regarding the "intent" of its "charges for use" of its facility, this is merely a restatement of an argument set out at length by Plaintiff in support of its tax year 1995 exemption.

> [U]nder OCGA Sec. 48-5-41(d), even though income is obtained from a lease of potentially tax exempt property, if a tax exempt purpose of a charitable owner is being furthered by that lease at an economic loss to that charitable owner (such as if the property could be leased at a much greater income), then the owner clearly is primarily carrying out its tax exempt purpose rather than primarily securing an income. . . . [A] charity for religious purposes leases its church to a religious group for public worship at an "out-of-pocket" loss to itself. Thus, the primary purpose is not to secure an income thereon but rather to further religious worship. . . . The primary purpose is not securing an

> income since a greater income could be obtained from a market price user.

(Plaintiff's "Legal Points About Property Tax Exemption . . . ," C.A. File No. 96cv-11544-4, pp. 3-4, attached to Plaintiff's application for ad valorem tax exemption for tax year 1995.)

But even assuming that factual differences distinguish Plaintiff's tax year 1996 claim from its appeal for previous years, such differences are not material. In order for Plaintiff to assert a "religious worship" exemption from ad valorem taxation, Plaintiff must itself be a religious or charitable institution within the meaning of the statute, which it is not. "The Constitution authorizes the General Assembly to exempt from taxation, among other things, all public property and certain property *owned by* religious, charitable and educational institutions. . . . " *Teacher's Retirement Sys. of Georgia v. City of Atlanta*, 249 Ga.App. 196, 199, 288 S.E.2d 200 (1982) (emphasis added).

Accordingly, the only material "fact" which Plaintiff might assert to distinguish its tax year 1996 appeal from its application for a religious exemption in previous years would be a claim that Plaintiff is now a religious institution and that its real property is used as a place of religious worship *by Plaintiff*. Such a claim of fact is not made; to the contrary, Plaintiff admits in its exemption application for 1996 that "[s]tarting in 1993, the use of the property was given to First Love Foursquare Church. . . . " (1996 "Affidavit," C.A. File No. 96cv-14239, ¶ 18.)

In *Tait*, the petitioner "assert[ed] that a judgment on a suit concerning income tax for a given year cannot estop either of the parties in a later action touching liability for

taxes of another year. He argue[d] further that, if this position is not well taken, he is not concluded by the former judgment because neither the proofs nor the parties are the same as in the prior proceeding." 289 U.S. at 623. In short, "the petitioner . . . contends that as to both the decision of the Court of Appeals is erroneous, for the reason that *the thing adjudged in a suit for one year's tax cannot affect the rights of the parties in an action for taxes of another year." Id.* at 624 (emphasis added). The Supreme Court did not agree.[6]

> The scope of estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the second action. In the latter the inquiry is whether the point or question is to be determined in the later action is the same as that litigated and determined in the original action.
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> . . .
>
> As petitioner says, the scheme of the revenue acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical

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[6] In so doing, the Supreme Court differentiated tax cases from those in different classes of litigation such as tariff cases, "on account of the unique character of the questions presented under the tariff acts." 289 U.S. 625.

question of the statute's application to the taxpayer's status.

This court has repeatedly applied the doctrine of res judicata in actions concerning state taxes, holding the parties concluded in a suit for one year's taxes as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. The public policy upon which this rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens.

We are not persuaded that the operation of the principle of the thing adjudged in tax cases will, as petitioner insists, produce serious inequalities, or result in great confusion; but any adverse consequence in the administration of the law furnishes no sufficient reason for the abandonment of a rule founded in sound policy, to the enforcement of which suitors are in justice entitled.

. . .

Is the question or right here in issue the same as that adjudicated in the former action? The pertinent language of the revenue acts is identical. . . . The petitioner suggests, however, that significant facts were stipulated in the present case which were not made to appear in the former proceeding. . . . The petitioner may not escape the effect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing, or significance of the facts, provided, as is the case here, the facts and the questions presented

> on those facts were before the court when it rendered its judgment.

Tait, 289 U.S. at 623-624, 625.

As in *Tait*, review of Plaintiff's pleadings in this matter reveals that "[t]he very right now contested arising out of the same facts appearing in this record was adjudged in the prior proceeding," and Plaintiff's appeal of the taxability of its property for tax year 1996 is accordingly barred by the doctrine of collateral estoppel. 249 U.S. at 626; *see also* fn. 6, *supra*.

Tax Appeals – Assessment

Regarding Plaintiff's claims that its property was "improperly assessed" for tax years 1992 through 1996, Defendant argues such claims must be dismissed for Plaintiff's failure to try them in the first term of court after filing.

O.C.G.A. § 48-5-311(f)(4)(A) provides that tax appeals "shall be heard before a jury at the first term following the filing of the appeal unless continued by the court upon a showing of good cause. If only questions of law are presented in the appeal, the appeal shall be heard as soon as practicable before the court sitting without a jury. Each hearing before the court sitting without a jury shall be held within 40 days following the date on which the appeal is filed with the clerk of the superior court." (1993). "[T]he burden is on the *appealing party* to have the action tried at the first term, but [such] a failure will not

work [a dismissal] if 'reasonable excuse' or 'excusable delay' is sown. Whether that has been shown addresses itself to the discretion of the trier of fact." *Spencer v. Lamar County Bd. of Tax Assessors*, 202 Ga.App. 742, 415 S.E.2d 332 (1992) (emphasis added).[7]

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[7] Although the appellate courts in the past have held that it is as much the duty of the Court's calendar clerk as the appealing party to ensure that a matter be heard before expiration of the term of court following its filing, in 1986 the Court of Appeals in *Haldi v. DeKalb County Bd. of Tax Assessors* distinguished *Lackey v. Dekalb County*, 156 Ga. App. 309 (274 S.E.2d 705) (1980) and *Etheride v. Etheridge*, 242 Ga. 101 (249 S.E.2d 569) (1978), interpreting O.C.G.A. § 48-5-311(f)(4)(A) to place such burden squarely upon the shoulders of the tax appellant.

> The legislative requirement of expeditious action by the appellant in matters of tax appeal to the superior court was recognized in [*DeKalb County Bd. of Tax Assessors v.*] *Stone Mountain Industrial Park* [147 Ga.App. 503, 249 S.E.2d 318 (1978)] and as we have noted is grounded in significant public policy considerations. The requirement is not inflexible; the appealing party may show a "reasonable excuse" or "excusable delay" (see *Stone Mountain Industrial Park*, supra at 504).
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> . . .
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> [T]he cases cited by appellant [*Lackey* and *Etheridge*] neither expressly nor impliedly overrule or modify *Stone Mountain Industrial Park* nor conflict with it. They either construe other statutes not at issue in the present case or highlight policy considerations of the public interest versus private interests, which adversely affect appellant's argument in this regard. Appellant has provided us with no meritorious reason for judicially obliterating the distinction in tax appeal cases as discussed in *Stone Mountain Industrial Park* and as relied upon in dismissing the appeal in

As noted above, Plaintiff's claim of "improper assessment" was initially asserted as to tax years 1992, 1993 and 1994 in C.A. File Nos. 94cv-11487 and 95cv-6484, which actions were subsequently consolidated by consent into C.A. File No. 95cv-11487-4. After the Court found in C.A. File No. 95cv-11487-4 that Plaintiff's property was not exempt Plaintiff voluntarily dismissed all of its remaining claims including the claims of "improper assessment" for tax years 1992, 1993, and 1994. When Plaintiff filed its "renewal" of its tax year 1992 through 1994 appeals in C.A. File No. 96cv11335-4, Defendant immediately moved to dismiss such claims pursuant to O.C.G.A. § 48-5-311(F): "Plaintiff's tax appeals are barred by its failure to obtain a trial at the first term of court. . . . " (Defendants' motion to dismiss, C.A. File No. 96cv-14239-4, filed November 21, 1996, p. 1.)

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this case. Nor does this court discern any need for disavowing its holding.

. . .

Contrary to appellant's assertion here, the facts of this case, rather than shield it from the statutory requirement, place it squarely within its necessity. Here, the trial court, as did the trial court in *Stone Mountain Industrial Park,* found a lack of facts which would constitute " 'excusable delay' " on the part of appellant and the record before us support such a finding by the lower court.

178 Ga.App. 521, 523, 344 S.E.2d 236 (1986); *c.f. Joint-City Bd. of Tax Assessors v. Turoff,* 184 Ga.App. 322, 323, 361 S.E.2d 528 (1987) (citing *Etheridge* and *Lackey*) (" 'It being the express command of the statute that appeal cases be tried by a jury at the first term after the appeal has been entered, it would appear the duty of the clerk to place the same upon the trial calendar for the first term after docketing.' ").

Plaintiff in its first response to the motion to dismiss contends that its tax appeals for tax years 1992 through 1994 "are not barred for not being tried at the first term."

> Plaintiff voluntarily dismissed this matter on 19 April 1996 WITHOUT PREJUDICE. Therefore, Plaintiff's action should not be dismissed now, as if this matter had been dismissed with prejudice. The only reason why Plaintiff voluntarily dismissed this matter without prejudice in the first place was in the interest of judicial economy. *Plaintiff had to dismiss the action voluntarily, without prejudice, in order to be able to proceed with its non interlocutory appeal. Plaintiff intended, in the interest of judicial economy, that any related matters pending would be stayed pending the outcome of the appeal before the Georgia Court of Appeals.*

(Plaintiff's first brief in response, C.A. File No. 96cv-11335-4, filed December 23, 1996, p. 1) (emphasis added).

Assuming without deciding that a tax appeal may be renewed pursuant to O.C.G.A. § 9-2-61, the fact that Plaintiff elected to take up its appeal on taxability rather than wait until after adjudication of the valuation issue in C.A. File No. 95cv-11487-4 to seek appellate review does not present a "reasonable excuse" or constitute a "excusable delay" for failing to have the valuation issue for tax years 1992 through 1994 tried in C.A. File No. 95cv-11487-4, and such appeals shall accordingly be dismissed. *Haldi v. DeKalb County Bd. of Tax Assessors*, 178 Ga.App. 521, 525-526, 344 S.E.2d 236 (1986).

Regarding Plaintiff's tax appeals on valuation for tax years 1995 and 1996, first asserted in C.A. File Nos.

96cv-11544-4 and 96cv-14239-4 and consolidated by consent into this action, Plaintiff in its second response to Defendant's motion to dismiss argues in part that "[t]he Foundation still plans to file a writ of certiorari to the U.S. Supreme Court [regarding the Court's decision on taxability in C.A. File No. 95cv11487-4.] Justice Kennedy has granted the Foundation an extension in time to file its petition until 12 March 1999. *Ideally, this matter should not go to trial until after consideration by the U.S. Supreme Court of the taxability issue.* Therefore Petitioner did not improperly fail to request a hearing for this case before the first term. . . . " (Plaintiff's second response, C.A. File No. 96cv14239-4, filed February 10, 1999, p. 4) (emphasis added). As of the date of this order, Plaintiff has not requested that this matter be placed upon the Court's trial calendar.

Although the 1995 and 1996 tax appeals were stayed by consent of the parties until resolution of Plaintiff's appeal in C.A. File No. 95cv-11487-4, and assuming such consent by Defendant operated as a waiver of the statutory requirement during that time period, once the stay was lifted on December 11, 1998, Plaintiff was required by O.C.G.A. § 48-5-311(f) to at least request that this matter be heard during the next term of court, which expired on February 28, 1999. Not only has Plaintiff failed to do so, it apparently intends to delay this appeal even further in order to seek the intervention of the U.S. Supreme Court. Such delay is neither "reasonable" nor "excusable" and Plaintiff's claim of "improper valuation" for tax years 1995 and 1996 must likewise be dismissed.

Refund claims

"In general, two procedures exist for challenging the assessment of property for tax purposes: an appeal, pursuant to OCGA § 48-5-311, and a refund action, pursuant to OCGA § 48-5-380. In *Gwinnett County v. Gwinnett I Ltd. Partnership*, 265 Ga. 645 (458 S.E.2d 632) (1995) [*Gwinnett I*], . . . [t]he Supreme Court held that the refund procedure set forth in OCGA § 48-5-380[8] . . . was designed to protect taxpayers

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[8] That procedure is codified as follows:

> In any case in which it is determined that an erroneous or illegal collection of any tax or license fee has been made by a county or municipality or that a taxpayer has voluntarily or involuntarily overpaid any tax or license fee, *the taxpayer from whom the tax or license fee was collected may file a claim for a refund with the governing authority of the county or municipality at any time within one year* or, in the case of taxes, three years after the date of the payment of the tax or license fee to the county or municipality. The claim for refund shall be in writing and shall be in the form and shall contain the information required by the appropriate governing authority. . . . the governing authority shall approve or disapprove the taxpayer's claim and shall notify the taxpayer of its action.
>
> *Any taxpayer whose claim for refund is denied by the governing authority of the county or municipality or whose claim is not denied or approved by the governing authority within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county in which the claim arises.* No action or proceeding for the recovery of a refund shall be commenced before the expiration of one year from the date of filing the claim for refund unless the governing authority of the county or municipality renders a decision on the claim within the one-year period.

O.C.G.A. § 48-5-380(b), (c) (Supp. 1998) (emphasis added).

from 'later-discovered defects' in the assessment process. *Id.* The circumstances under which such a refund action could be pursued when an appeal pursuant to OCGA § 48-5-311 had not been previously taken, therefore, were severely limited. In the absence of a timely appeal, a refund procedure is available only 'if the taxpayer alleges that the assessment is based on matters of fact in the record which are inaccurate, or that the assessment was reached by the use of illegal procedures.' *Id.* at 647." (*Nat'l Health Network Inc. v. Fulton County*, 228 Ga.App. 584, 585, 492 S.E.2d 333 (1997).

Relying upon *Gwinnett I*, Defendant contends that Plaintiff has failed to state a claim for a refund as it has failed to allege "factual inaccuracy" or "illegality."

> [T]he determinative factor in deciding whether an action seeking a refund of ad valorem real property taxes may be maintained is not the general nature of the ground asserted, but the underlying facts supporting the asserted ground. If the taxpayer alleges that the assessment is based on matters of fact in the record which are inaccurate, or that the assessment was reached by the use of illegal procedures, then the taxpayer has asserted a claim that the taxes were 'erroneously or illegally assessed and collected,' which is what § 48-5-380 addresses. A claim based on mere dissatisfaction with an assessment, or on an assertion that the assessors, although using correct procedures, did not take into account matters which the taxpayer believes should have been considered (e.g., different comparable sales for the purpose of establishing value), is not, however, one which

> asserts that an assessment is erroneous or illegal within the meaning of § 48-5-380.

Gwinnett I, 265 Ga. at 645.

Plaintiff in opposition states that "Plaintiff has contended all along that Defendants had erred as to . . . facts about valuation[;]" more precisely, "Plaintiff averred in Paragraph 1[2[9]] of the Amended Complaint in [C.A. No. 95cv-11487-4 that] 'The Foundation contends that the County and the Court made grievous errors of law and fact when they denied the Foundation's requests for exemption from ad valorem taxation.' " (Plaintiff's second response, p. 2; Plaintiff's first response, p. 2.) But Plaintiff's attempt to amend its complaint to interpose such allegations was *denied* by the Court on March 14, 1996.

> MR. PANKEY: I have one preliminary matter. I filed a Motion to Amend the Complaint in response to Ms. Stuckey's trial brief, . . . and I'm asking that the amended complaint be allowed.
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> MS. STUCKEY: I don't think it is proper to amend his complaint at this point in the trial process. [T]he Pretrial Order has been filed with Your Honor. In additional, I don't think it is sufficient because it alleges there is illegality

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[9] Plaintiff incorrectly references this as Paragraph 10 of its "amended" complaint, but Plaintiff never amended its complaint in C.A. File No. 95cv-11487-4. Paragraph 10 of Plaintiff's original complaint in that action does not allege error or illegality but states instead that "[i]f the Foundation were to prevail in the tax appeal actions for 1992, 1993 and 1994, it would be entitled to a refund for those tax years." (Complaint, C.A. File No. 95cv-11487-4, ¶ 10, filed August 30, 1985).

> and factual errors. It is not sufficient under the Gwinnett [I] case. It is merely saying [Plaintiff] is dissatisfied with the assessments that the Tax Assessors have placed on the property, and I don't think it sufficiently alleges what errors are in the record. Number one, I think it is late, and, number two, I don't think it is sufficient for the purpose of the Gwinnett [I] case.
>
> THE COURT: No. I think, once a pretrial has been entered and a case has been on a calendar two or three times, it is not timely to file an Amended Complaint on the morning of trial, so I will deny your request.

(Trial Transcript, C.A. No. 95cv-11487-4, TR 4-5.)

It is only in Plaintiff's October 16, 1996 "renewal" of its refund claims in C.A. No. 96cv-14239-4 that Plaintiff attempts to allege the requisite "factual inaccuracy" and "illegality" necessary to maintain a claim for tax refund under *Gwinnett I*: "This action, which the Foundation wishes to renew, consists of three . . . cases . . . consolidated for this action[, including] Civil Action No. 95-11487-2, a tax refund suit for the refund of ad valorem real property taxes paid for tax years 1988, 1989, 1990, 1991, and 1992.[10] . . .

> 14. The Foundation contends that the subject property is entitled to exemption from ad valorem taxation as a place of religious worship and as an institution of purely public charity.

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[10] As noted by Defendant, "Plaintiff [in its filings] variously claims refunds for tax years 1988 through 1992 . . . , 1988 through 1994 . . . , and 1988 through 1993. . . . " (Defendant's brief, filed November 21, 1996, fn. 1.)

> 15. The Foundation contends that the County and the Court made grievous errors of fact and law when they denied the Foundation's requests for exemption from ad valorem taxation because the subject property qualifies for exemption . . . as a place of religious worship and as an institution of public charity in accordance with the facts in this case and in accordance with the law in Georgia.
>
> 16. The Foundation has appealed the denial by the Superior Court of DeKalb County of exempt status for the subject property to the Georgia Court of Appeals (Appeal No. A96A2534), because the Foundation contends that the County and the Court need to correct grievous errors of law and fact upon which the denial was based.
>
> 17. If the Foundation were to prevail in that appeal, it would be entitled to a refund of ad valorem taxes paid for all of the subject years (1988-1994[11]).

(Plaintiff's Complaint for Tax Refund and Tax Appeal," C.A. No. 96cv-11335-4, filed October 16, 1996).

Again, *Gwinnett I*: "If the taxpayer alleges that the assessment is based on *matters of fact in the record which are inaccurate,* or that the assessment was *reached by the use of illegal procedures,* then the taxpayer has asserted a claim that the taxes were 'erroneously or illegally assessed and collected,' which is what § 48-5-380 addresses." *Id.* at 645 (emphasis added).

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[11] See fns. 9 and 10, *supra.*

Plaintiff's claim for refund simply does not measure up under *Gwinnett I*. It does not point to errors of facts in the record but instead complains that Defendant and Court "*made* errors of fact and law" in concluding that Plaintiff's property was not exempt. Nor does Plaintiff contend that any "illegal procedures" were utilized in assessing Plaintiff's property; instead, it claims that the Defendant's and the Court's erroneous interpretations of the law resulted in the denial of its exemption. As Defendant contends this is simply another variation of "[a] claim based on mere dissatisfaction with an assessment. . . . " *Id.* Such a claim, based "on an assertion that the assessors, although using correct procedures, did not take into account matters which the taxpayer believes should have been considered [in this case, the facts allegedly supporting exemption of the property] *is not . . . one which asserts that an assessment is erroneous or illegal within the meaning of § 48-5-380.*" *Id.* (emphasis added).

Defendant further argues that even if Plaintiff's claim was not barred by the holding in *Gwinnett I*, Plaintiff lacks standing to assert a refund claim for tax years 1988 through 1991 as Plaintiff's lender, and not Plaintiff, paid the taxes at issue. In C.A. File No. 93cv-5927-4 Plaintiff attempted to enjoin tax payments by its mortgages, Reliance Trusts, and thereafter admitted *in judicio* that the tax payments for tax years 1988 through 1991 were in fact made by Reliance Trusts. "[T]he Foundation borrowed funds for the remitted . . . payments to Defendants on 28 May 1993, on in the amount of $47,649.35 for the tax bill for 1988 plus interest and penalties. . . . These loans were made by the Mortgagee on the property." (First "Petition

for Temporary Restraining Order . . . ," C.A. File No. 93cv-5927-4, ¶ 19, filed July 6, 1993.) "The Foundation's mortgagee, as a loan to the Foundation, paid to the taxing authorities the 89, 90, and 91 taxes. . . . " (Second "Petition for Temporary Restraining Order . . . ," C.A. File No. 93cv-5927-4, ¶ 18, filed December 30, 1993.) "Reliance Trusts is a trust, one of the beneficiaries of which is the president of the Foundation. Reliance [T]rusts is also the Foundation's mortgagee." (Plaintiff's "Brief in opposition to Defendant's motion to dismiss," C.A. File No. 93cv-5927-4, filed May 27, 1994.)[12]

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[12] The Court notes that these admissions comport with an affidavit originally filed in C.A. File No. 95cv-11487-4, in which DeKalb County Tax Commissioner Tom Scott testified that "[a]ttached hereto as Attachment 'A' are true and correct copies of checks which my office received as payment for ad valorem real property taxes [for Plaintiff's property].

4.

For tax year 1988, . . . my office received a check from Ragsdale, Beals, Hooper and Siegler on May 28, 1993 in the amount of $47,649.35.

5.

For tax year 1989, . . . my office received a check from Reliance Trust No. 1 on July 1, 1993 in the amount of $33,932.74.

6.

For tax year 1990, . . . my office received a check from Reliance Trust No. 1 on July 28, 1993 in the amount of $32,043.58.

7.

For tax year 1991, . . . my office received a check from Reliance Trust No. 1 on September 1, 1993 in the amount of $20,156.26.

O.C.G.A. § 48-5-380(b) provides that "[i]n any case in which it is determined that an erroneous or illegal collection of any tax or license fee has been made by a county . . . , *the taxpayer from whom the tax or license fee was collected* may file a claim for a refund with the governing authority. . . . " (1991) (emphasis added). As "the tax or license fee" at issue was *not* "collected" from Plaintiff, Plaintiff lacks standing to assert a claim for refund for the tax years 1988, 1989, 1990, and 1991. Even if Plaintiff's complaint met the pleading requirements of *Gwinnett I*, this lack of standing independently requires dismissal of its refund claims for the tax years 1988 through 1991.

Regardless of from whom Plaintiff's tax year 1992 assessment was "collected,"[13] it is similarly subject to dismissal independent of *Gwinnett I*. Plaintiff conditioned its refund claim for tax year 1992 (as well as for 1988-1991) upon the successful prosecution of its appeal in C.A. File No. 95cv-11487-4. "The Foundation has

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(Defendant's brief in support, Exhibit "A" thereto, C.A. File No. 96cv-11335, filed November 21, 1996.) As this matter is before the Court on a motion to dismiss, however, only Plaintiff's admissions are considered in deciding the same.

[13] Plaintiff in its 1993 action to enjoin payment of taxes by its mortgagor, Reliance Trusts, alleged that it paid the 1992 taxes with certified funds. "The amount of the Ad Valorum [sic] taxes for the year 1992, has been paid by tendering a cashier's check (# 50136068) in the amount of $18,105.76 due as of May 28, 1993 ($17,944.68 as shown being due in said Fi Fa)." (First "Petition For Temporary Restraining Order . . . ," C.A. File No. 93cv-5927-4, "Affidavit of Illegality" attached thereto.) Plaintiff admitted, however, that it had borrowed such funds from Reliance Trusts. (First "Petition For Temporary Restraining Order . . . ," C.A. File No. 93cv-5927-4, ¶ 19, filed July 3, 1993.)

appealed the denial by the Superior Court of DeKalb County of exempt status for the subject property to the Georgia Court of Appeals (Appeal No. A96A2534). . . . *If the Foundation were to prevail in that appeal, [then] it would be entitled to a refund of ad valorem taxes paid for all of the subject years (1988-1994).* (Plaintiff's Complaint ¶¶ 16-17) (emphasis added); *see also,* fn. 10, *supra.* As Plaintiff's claim for refund is admittedly premised upon its claim that the subject property is exempt from taxation, the denial of its appeal on that issue is fatal to its claim for refund for all tax years claimed upon to and including tax year 1992.

Finally, to the extent that Plaintiff in this action is attempting to assert a claim for refund for any tax year subsequent to 1992, (*see* fn. 10, *supra*), Plaintiff fails to allege in its complaint that prior to bringing this action it filed a timely request for refund for such tax years with the taxing authority as is required by O.C.G.A. § 48-5-380(b), (c) (Supp. 1998). (*See* fn. 5, *supra.*)

Based upon the foregoing, Defendant's motion to dismiss (filed November 22, 1996 and amended January 11 and February 22, 1999) shall be, **and hereby is GRANTED** and Plaintiff's complaint shall be, **and hereby is, DISMISSED.**

This the 23rd day of March, 1999.

/s/ Gail C. Flake
JUDGE GAIL C. FLAKE
DEKALB SUPERIOR COURT
STONE MOUNTAIN
JUDICIAL CIRCUIT

cc: Hugh S. Hunt, for Plaintiff
Richard A. Carothers, Thomas M. Mitchell,
for Defendant

APPENDIX "B"

IN THE SUPERIOR COURT OF DEKALB COUNTY STATE OF GEORGIA

CONSTRUCTIVIST FOUNDATION, INC., Plaintiff, vs. DEKALB COUNTY BOARD OF TAX ASSESSORS, TOM SCOTT, Tax Commissioner, and DEKALB COUNTY BOARD OF COMMISSIONERS, Defendants.	:	Civil Action File No. 96cv-11335-4
CONSTRUCTIVIST FOUNDATION, INC., Plaintiff, vs. DEKALB COUNTY BOARD OF TAX ASSESSORS. Defendant.	:	Civil Action File No. 96cv-11544-4
CONSTRUCTIVIST FOUNDATION, INC., Plaintiff, vs. DEKALB COUNTY TAX ASSESSORS, Defendant.	:	Civil Action File No. 96cv-14239-4

ORDER TO CONSOLIDATE AND TO STAY

(Filed Feb. 5, 1997)

Plaintiff's and Defendants' motions to consolidate the above-styled cases and Plaintiff's motion to stay came regularly before the Court for consideration. Upon review of the pleadings and other matters of record, the Court finds as follows:

These are the latest in a series of seven lawsuits from Plaintiff[1] regarding the taxability and assessment of certain real property owned by Plaintiff and located at 3830 Ashford Dunwoody Road, DeKalb County, Georgia. The suits and their subject matter are as follows:

1. *Constructivist Foundation et al. v. DeKalb County*, C.A. File No. 93cv-5927-4 – action by Plaintiff to enjoin payment of 1989-1991 taxes by third party lender and for refund of 1988 and 1992 taxes;

2. *Constructivist Foundation v. DeKalb County Tax Assessors*, C.A. File No. 94cv-13512-4 – appeal for tax years 1992 and 1993;

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[1] Two tax cases involving the same property were filed by the Lee Foundation in 1990 and 1991. *Lee Foundation v. DeKalb County*, C.A. File No. 90c-3632-4, a certiorari action involving the 1989 tax assessment, was dismissed on September 21, 1990 on the defendant's motion and plaintiff's appeal of that decision was dismissed by the Court of Appeals on February 25, 1991. *Lee Foundation v. DeKalb County Tax Assessors*, C.A. File No. 91c-1646-4, a tax appeal for the tax year 1990, was dismissed for want of prosecution on April 10, 1991, and that decision was affirmed on appeal by the Supreme Court on July 23, 1992.

3. *Constructivist Foundation v. DeKalb County*, C.A. File No. 95cv-6484-4 – appeal for tax year 1994;

4. *Constructivist Foundation v. DeKalb County et al.*, C.A. File No. 95cv-11487-4 – refund action for tax years 1988, 1989, 1990, 1991, and 1992;

5. *Constructivist Foundation v. DeKalb County et al.*, C.A. File No. 96cv-11335-4 – appeal action for tax years 1992, 1993 and 1994, and refund action for tax years 1988, 1989, 1990, 1991, 1992 and 1993;

6. *Constructivist Foundation v. DeKalb County Board of Tax Assessors*, C.A. File No. 96cv-11544-4 – appeal action for tax year 1995; and

7. *Constructivist Foundation v. DeKalb County Tax Assessors*, C.A. File No. 96cv-14239-4 – appeal action for tax year 1996.

Plaintiff's first action (C.A. No. 93cv-5927) was dismissed on August 12, 1994, on Defendant's motion. Plaintiff's second and third actions (C.A. Nos. 94cv-13512, 95cv-6484) were consolidated with the fourth action (C.A. No. 95cv-11487) and the exemption issues raised therein were tried before the Court without a jury in March 1996. On April 2, 1996, the Court entered an order finding that Plaintiff's property was not exempt from taxation as a place of religious worship for the tax years 1992, 1993 and 1994, and on May 1, 1996, Plaintiff filed a notice of appeal as to such finding. Before the notice of appeal was filed,

however, Plaintiff on April 19, 1996 dismissed the consolidated action without prejudice. Plaintiff's appeal is currently before the Court of Appeals as Case No. A96A2534 (docketed August 14, 1996).[2]

Plaintiff's fifth,[3] sixth, and seventh actions are presently before this Court, and between them present tax appeals for the years 1992 through 1996 and refund claims for the tax years 1988 through 1993. It appears from review of the pleadings that the issues raised therein, relating as they all do to the taxability and assessment of the real property located at 3830 Ashford Dunwoody Road, are substantially similar and that consolidation of these cases is appropriate. O.C.G.A. § 9-11-42(a) (1993).

It further appears that insofar as Plaintiff is attempting to raise the issue of taxability of the subject property for the tax years 1992 through 1994, the decision of the Court of Appeals in Appeal No. A96A2534 may preclude or limit certain exemption issues, and thus a stay of the consolidated cases is also appropriate.

THEREFORE, it is **HEREBY ORDERED** that Civil Action File Nos. 96cv-11335-4, 96cv-11544-4 and 96cv-14239-4 be, **and hereby are CONSOLIDATED** into a single action to be styled as *Constructivist Foundation v. DeKalb County Board of Tax Assessors, Tom Scott, and*

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[2] As the appeal was docketed with the Court of Appeals during its September term, a decision on Plaintiff's appeal is anticipated before March 21, 1997.

[3] A motion to dismiss from Defendant DeKalb County is pending in Plaintiff's fifth action (C.A. No. 96cv-11335).

DeKalb County Board of Commissioners, C.A. File No. 96cv-14239-4. The clerk of court is **hereby directed** to take all necessary steps to timely accomplish such consolidation.

It is **FURTHER ORDERED** that *Constructivist Foundation v. DeKalb County Board of Tax Commissioners et al.,* C.A. File No. 96cv-14239-4 be, **and hereby is, STAYED** pending resolution of Appeal No. A96A2534 (Court of Appeals) or until future order of the Court.

This the 4 day of February, 1997.

/s/ Gail C. Flake
JUDGE GAIL C. FLAKE
DEKALB SUPERIOR COURT
STONE MOUNTAIN
JUDICIAL CIRCUIT

cc: Hugh H. Hunt
Kathleen A. Wasch